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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 319

PITTSBURGH TOWING COMPANY, *Appellant*

v.

MISSISSIPPI VALLEY BARGE LINE COMPANY, ET AL., *Appellees*

On Appeal From the United States District Court for the Eastern District of Missouri Eastern Division

MOTION TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

Pursuant to Rules 14, Paragraph 2, and 16(1)(c) of the Rules of this Court, Mississippi Valley Barge Line Company, American Commercial Lines, Inc., and Union Barge Line Corporation, protestants before the Interstate Commerce Commission and plaintiffs in the District Court, move that this appeal be dismissed, or in the alternative, that the judgment of the District Court be affirmed.

STATEMENT

This is a direct appeal from a judgment of a three-judge district court (J.S.A. 10a)[1] setting aside orders of the Interstate Commerce Commission in Finance Docket 21193, *Pittsburgh Towing Company, Certificate Transfer—Charles Zubik,* which Commission orders authorized transfer of water carrier Certificate W-364 from Charles Zubik to the Pittsburgh Towing Company.[2]

The appellant Pittsburgh Towing Company filed notice of appeal in the district court on April 15, 1966.[3] The appellant filed its Jurisdictional Statement, and this case was docketed, on July 6, 1966, more than 60 days following notice of appeal. No application for extension of time was filed, or granted, prior to the expiration of the 60-day period prescribed in the Rules of this Court. (Rule 13, Paragraph 1) Rule 34, Paragraph 2, of the Rules of this Court require the clerk to refuse to receive any such application after the expiration of the 60-day period.

Neither the United States, nor the Interstate Commerce Commission, has appealed from the decision of the district court. The appellant Pittsburgh Towing Company was a party, and the proposed transferee, in the proceedings before the Commission, and intervened

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[1] "J.S." and "J.S.A." refer to the Jurisdictional Statement and the appendix to the Jurisdictional Statement, respectively.

[2] The final order of the Commission is found at pages 41a-42a of the Jurisdictional Statement. The opinion, and judgment and decree, of the District Court are found at J.S.A. 1a-9a, and J.S.A. 10a-11a, respectively.

[3] The assertion in the Jurisdictional Statement as filed, (J.S. 2) that notice of appeal was filed on May 15, 1966, is erroneous.

as a defendant in the proceedings before the district court.

Under Section 312 of the Interstate Commerce Act, 49 U.S.C. Sec. 912,[4] water carrier certificates may be transferred "in accordance with such regulations as the Commission shall prescribe for the protection of the public interest and to insure compliance with the provisions of this part."[5] The Commission's regulations, set forth in Title 49, Part 306, Code of Federal Regulations, require a detailed showing of the transferee's fitness and ability to conduct the operations authorized. The applicants are required to submit a "copy of all contracts or other written instruments entered into, or proposed to be entered into, pertaining to the proposed transfer." 49 CFR Sec. 306.4(b). Additionally, in the case of abandoned or suspended operations, a proposed transfer "will be approved only upon a showing that the suspension of operations was caused by circumstances over which the holder of the certificate or permit had no control, and that the water-carrier operations authorized under the certificate or permit sought to be transferred will be consistent with the public interest." 49 CFR Sec. 306.9.

This proceeding arose out of an application filed with the Commission on July 8, 1960 by Charles Zubik to approve the transfer of water carrier Certificate W-364 from himself to the Pittsburgh Towing Company. On September 9, 1960, the Commission, by Division 4, upon a finding of "good cause therefor," approved the transfer by an order based solely upon the application. This

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[4] Set forth in full at J.S. 3.

[5] "Part" refers to Part III of the Interstate Commerce Act which provides for the regulation of water carriers.

order of September 9, 1960 was affirmed by the Commission on March 19, 1965 (J.S.A. 42a), with four Commissioners dissenting.

The application, which was the sole basis for Division 4's approval of the transfer, stated that Zubik would be the holder of all stock issued and outstanding (J.S.A. 8a) and would be an officer of the corporation. (J.S.A. 4a) Zubik, in the notification sent to appellees and other competitors, stated that "for personal reasons I have applied to the Interstate Commerce Commission for permission to change my certificate from a sole proprietorship to a corporation, of which I am the owner, Pittsburgh Towing Company." (J.S.A. 5a) The district court found that each of these representations was refuted by the record and that deceit was perpetrated by Zubik in his letter to his competitors. (J.S.A. 4a, 5a, 8a, 9a)

The district court further found that, prior to filing the application, Zubik had entered into option agreements with Edmund D. Osbourne whereby Osbourne was to obtain ownership of the certificate through purchase of Pittsburgh Towing's stock, following Commission approval of the Zubik-Pittsburgh Towing transfer. (J.S.A. 3a-4a) The court held: "The plan clearly was to transfer the certificate from Zubik, a sole proprietorship, to a corporation owned by Osbourne when the application was filed, and to be owned by Osbourne when the transfer was consummated." (J.S.A. 9a) After noting the violation of the Commission's regulations in applicants' nondisclosure of the option agreements (J.S.A. 6a-7a), the court concluded: "No reasonable reader of the record before the Commission and this court could come to

any conclusion regarding the purpose of the application of transfer of Water Carrier Certificate W-364 other than that of transferring ownership of the certificate from Zubik to Osbourne and effectively circumventing the regulations of the Commission." (J.S.A. 7a) The Commission was unaware of the option agreements when it approved the transfer on July 9, 1960. (J.S.A. 5a) As the district court observed, these agreements changed the entire nature of the proceedings from a change in the *form* of ownership to a change in ownership. (J.S.A. 8a).

Additionally, the district court found a total absence of information in the application to establish the transferee's financial fitness to conduct the operations authorized by the certificate despite the requirements of the Commission's regulations. (J.S.A. 8a) The record showed that the transferee owned no towboats, no barges, and had little, if any, capital. (J.S.A. 5a)[6]

Finally, the court found a failure by applicants to make the showing required by 49 CFR Sec. 306.9, governing the transfer of dormant certificates. There was, the court concluded, a "complete void" of any showing that the resumption of operations would be in the public interest. (J.S.A. 6a) Section 306.9 further required a showing by the transferor that suspension of operations was caused by circumstances over which he had no control. (J.S.A. 6a) As both Commissioners Murphy and Brown noted in their dissenting opinions, Zubik made no such showing. (J.S.A. 39a, 40a) The district court rejected the Commission's

[6] The Commission's report showed that transferee had a deficit in its capital stock and surplus account of $50,711. (J.S.A. 30a)

resort to official notice that business conditions were unfavorable for water carriers during the 1950's because the record showed that Zubik's competitors incurred no interruption of service during this period (J.S.A. 6a)[7]

In its judgment and decree, the district court permanently enjoined the Commission "from transferring water carrier certificate No. W-364 to Intervenor Pittsburgh Towing Company, as authorized by said orders." (J.S.A. 11a) The orders referred to are Division 4's order of September 9, 1960, and the affirmance of that order by Division 3 on April 9, 1963 and December 19, 1963 and by the full Commission on March 19, 1965. (J.S.A. 10a) The Memorandum Opinion of the district court required plaintiffs (appellees) to submit a decree in accordance with such opinion "on notice unless consultation among the parties shall bring about a waiver of notice." (J.S.A. 9a) Copies of plaintiffs' proposed decree were sent to the attorneys for appellant and all other parties on March 14 and 22, 1966. Changes were made therein at the request of counsel for the Interstate Commerce Commission but counsel for appellant interposed no objection to the judgment and decree as signed by the judges of the three-judge district court.

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[7] Commissioner Brown observed in her dissenting opinion: "It, therefore, appears that official notice was taken of nonexistent conditions." (J.S.A. 40a)

ARGUMENT

This Appeal Should Be Dismissed Under Rule 14(2) of This Court's Rules.

Rule 13(1) of the Rules of this Court provides that it shall be the duty of the appellant to docket the case and file the record thereof with the clerk of this court not more than 60 days after the filing of the notice of appeal. Applications for extension of such time must be made before the expiration of the 60-day period. (Rules 13 and 34(2)) Under Rule 34(2), the clerk of the court "will refuse to receive any application for extension sought to be presented after expiration of such period."

In this proceeding, notice of appeal was filed with the District Court, Eastern District of Missouri, Eastern Division, on April 15, 1966. Appellant filed its jurisdictional statement, and the case was docketed, on July 6, 1966, more than 60 days following the notice of appeal.

Pursuant to the provisions of Rule 14(2) of the Rules of this Court, appellees move that this Court dismiss this appeal, with such orders thereon with respect to costs as may be just.

Alternatively, Appellees' Motion To Affirm Should Be Granted.

This appeal presents no substantial question warranting plenary consideration by this Court.

The issues raised on appeal have no general application or importance, and are restricted to an essentially factual inquiry as to whether, on a specific record, the requirements of the Commission's transfer regulations were met. (See J.S. 2-3). There is, in this proceeding, no basis for departing from the general rule that

the reviewing court's determination of whether the agency's findings are supported by substantial evidence is final. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 491].

As observed by the district court, legislative regulations, created by a Federal agency pursuant to congressional authority, have the force of law, and the agency is as bound by such regulations as is the general public. *Columbia Broadcasting System* v. *U. S.,* 316 U.S. 407, 417-419, 422; *McKay* v. *Wahlenmaier,* 226 F. 2d 35, 43. The Commission's regulations governing the transfer of certificates were promulgated pursuant to Section 312 of the Interstate Commerce Act. (Set forth at J.S. 3) The Commission itself has held that transfers may be consummated only in accordance with its transfer regulations. *United States Lines Co. Certificate Transfer,* 260 I.C.C. 355 at page 358.

In a unanimous decision, the three-judge district court found that the record conclusively established a lack of compliance with the Commission's transfer regulations. When the Commission approved the transfer on September 9, 1960, it relied solely on the application which represented that Zubik would be an officer, and the holder of all outstanding and issued stock, of the transferee corporation, which representations were found by the court to be refuted by the record. Unknown to the Commission, the transfer in question was in effectuation of pre-existing, undisclosed agreements between Zubik and Osbourne whereby Osbourne was to obtain ownership of the water carrier certificate. The evidence on this point was so clear that the district court concluded:

> "No reasonable reader of the record before the Commission and this court could come to any con-

> clusion regarding the purpose of the application of transfer of Water Carrier Certificate W-364 other than that of transferring ownership of the certificate from Zubik to Osbourne and effectively circumventing the regulations of the Commission." (J.S.A. 7a)

By presenting the transfer as a change in Zubik's form of ownership, while the transfer was instead a change in ownership, determination of the transferee's fitness and ability was circumvented. As this Court observed in connection with regulations governing the transfer of motor carrier certificates:

> "Plainly the finding of the requisite fitness, willingness, and ability of the first applicant is wholly inapplicable to his proposed transferee. . ." *United States* v. *Resler,* 313 U.S. 57, at page 61.

The Commission's order of September 9, 1960, was, therefore, based upon a complete misconception of the transaction before it, and was totally invalid.

Aside from failure to file the Zubik-Osbourne agreements, the district court found that the Commission's regulations had not been followed in other essential respects. The court found a "complete void" of any showing that resumed operations would be in the public interest, and no more than a mere assertion by Zubik that cessation of operations was caused by circumstances beyond his control, despite the provisions of 49 CFR 306.9 which clearly state that approval can be had only if such facts are established. In addition, there was in the application "a total absence of information that Pittsburgh was in any way financially fit to carry on the operations authorized by the certificate." (J.S.A. 8a) Nothing more was recited in the

application than the "intention" of the supposed owner of the transferee. (J.S.A. 8a)

In short, the district court found that Division 4's approval of the transfer was based on a misconception regarding the transaction before it, such misconception having been induced by nondisclosures and misrepresentations, with this fatal error being compounded by a total lack of information to satisfy the Commission's regulations in other vital respects.

The Appellant contends that in failing to remand the case to the Commission, the district court usurped the powers of the Commission. (J.S. 6-7) In its judgment and decree, the district court permanently enjoined the Commission from transferring the Certificate No. W-364 to Pittsburgh Towing Company, as authorized by the Commission's order of September 9, 1960, and as affirmed in its subsequent orders.[8] So far as a remand was concerned, the Commission had previously reopened the proceeding after review had been sought in the district court. (J.S.A. 1a) This produced another affirmance by the Commission of its order of September 9, 1960. (J.S.A. 42a)

In view of the district court's conclusion that no "reasonable reader"[9] before the Commission or before the court could find the purpose of the application to be other than to effectively circumvent the Commis-

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[8] This order was presented to and signed by the district court after notice to the parties. Appellant interposed no objection to the form of the order and raised its objection with respect thereto for the first time in this Court.

[9] The hearing examiner, who presided at the hearings in the proceeding before the Commission, found misrepresentation in the application and recommended disapproval of the transfer. (See J.S.A. 7a)

sion's regulations, further consideration of the application by the Commission would have been pointless. The proceeding had been pending some five and one-half years before the Commission, during which time Pittsburgh Towing had conducted operations under the invalid order of September 9, 1960.[10]

In this proceeding, there has been no usurpation of Commission powers by the district court. The district court found invalid the Commission's orders authorizing transfer of the certificate, and permanently enjoined the Commission from transferring water carrier certificate No. W-364 to Pittsburgh Towing Company, as authorized by said orders. The enforcement or effectuation of invalid orders of the Commission have been similarly enjoined in other cases. *Arkansas Public Service Commission* v. *United States,* 147 F. Supp. 454, aff'd *per curiam* 355 U.S. 4; *Movers Conference of America* v. *United States,* 205 F. Supp. 82, 86. In this proceeding, the district court found that the Commission could not reasonably find the application to be other than a circumvention of the regulations it was bound to enforce, a finding which neither the Commission nor the United States has appealed. Under the circumstances, a permanent injunction against the transfer authorized in the Commission's orders was the only appropriate and adequate remedy. No doubt remained as to any essential element of decision, and a remand would serve no useful purpose.

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[10] This order permitted the transferee to perform the water-carrier service authorized under said certificate, pending issuance of the certificate. The Commission previously refused to vacate this order on September 13, 1961 and April 9, 1963.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this appeal should be dismissed, or in the alternative, that the judgment of the district court should be affirmed.

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